



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

VIRGINIA STATE CORPORATION COMMISSION.

RICHMOND, VA.

NORFOLK & WESTERN RAILWAY COMPANY v. TIDEWATER RAILWAY COMPANY.*

—, 1905.

1. **RAILROADS**—*Crossing of one road by another—Proceedings before state corporation commission to inquire into the necessity of—Notice—Requirement as to time directory merely—Sec. 1294b (3), Va. Code 1904*—Subsec. 3, of sec. 1294b, Va. Code 1904, allowing the company whose works are to be crossed by another company fifteen days from the receipt of notice of the intention to cross within which to apply to the State Corporation Commission to inquire into the necessity of such crossing, is merely directory as to the time allowed, and the Corporation Commission may, in its discretion, hear such petition after the expiration of the fifteen days.
2. **RAILROADS**—*Crossing of one road by another—Right of railroad to cross intervening railroads an absolute right—Sec. 166, Cons. 1902, sec. 1294d (62), sec. 1294b (3), Va. Code 1904.*—Under sec. 166, Cons. 1902, and subsec. 62 of sec. 1294d, Va. Code 1904, any railroad, created under the laws of this state and which has fully located its route, has the absolute general right to cross any intervening railroad in the manner and upon the terms prescribed by subsec. 3, of sec. 1294b, Va. Code 1904.
3. **RAILROADS**—*Crossing of one road by another—Proceedings to determine the character of—Sec. 1294d (38), Va. Code 1904.*—Subsec. 38, of sec. 1294d, Va. Code 1904, declaring it to be the general policy of the state that all crossings of one railroad by another, or of a county road or highway by a railroad, shall, whenever reasonably practicable, pass above or below the existing structure, should not be the sole controlling regulation in determining the character of the crossing and should be more rigidly applied in the crossing of highways by railroads and in the crossing of an electric line by a steam railroad than in the crossing of one steam road by another.
4. **RAILROADS**—*Crossing of one road by another—Eminent domain—Sec. 1105e (52), Va. Code 1904.*—In proceedings before the State Corporation Commission on a petition by one railroad to prevent another from crossing at grade, there is no question of the exercise of the power of eminent domain or condemnation; for one railroad has the absolute power to cross another, and the crossing is a privilege granted and is not a taking of property within the meaning of the condemnation statutes, and sec. 1105e (52), Va. Code 1904, has no application.

*Syllabus by C. B. Garnett.

5. RAILROADS—*Crossing of one road by another—Payment of damages—Sec. 1294b (3), Va. Code 1904.*—The last sentence of sec. 1294b (3), Va. Code 1904, providing for the payment of damages by the company desiring to cross the works of another company, “such damages to be ascertained according to the law regulating the exercise of the right of eminent domain”, manifestly refers to the incidental damages to the general business and operations of the road to be crossed, and not to damages for property to be taken.
6. RAILROADS—*Crossing of one road by another—How damages ascertained.*—Where a railroad company is damaged by the method in which another road crosses it, then it seems that the company sustaining the damage should require the other company to apply to the proper court having jurisdiction for the appointment of commissioners to ascertain the incidental damages.
7. RAILROADS—*Crossing of one road by another—Opening public highways—Secs. 944a (5), 1294b (3), 1294d (38), (39), Va. Code 1904.*—A proceeding before the State Corporation Commission to determine the method by which one railway shall cross another is not so similar to a proceeding to open a public highway that a case construing the statutes governing the latter can be taken as a precedent in the former—distinguishing *R. F. & P. R. Co. v. Johnston*, 103 Va. 456, 49 S. E. 496.
8. RAILROADS—*One road crossing another—Grade crossing allowed under the circumstances of this case.*—Under all facts adduced in this case, the commission is of the opinion that a grade crossing should be allowed..

On petition of the Norfolk and Western Railway Company.

The opinion states the case,

Robert M. Hughes, Jos. T. Doran, Eppa Hunton, Lucian Cocke, for the petitioner.

E. W. Knight, Walter H. Taylor, Thos. D. Ranson, for the respondent.

HON. BEVERLY T. CRUMP, Chairman.

This is a proceeding under Section 3 of Chapter II, of the Act Concerning Public Service Corporations, this section being carried into the Code of 1904 as sub-section 3 of section 1294b.

This section 3 is a re-enactment of the former section 1094 of the Code providing for the proceeding and method by which any railroad, canal or turnpike company may cross any other railroad, canal or turnpike company. The Norfolk and Western Railway Company, under this statute, filed its petition before the Com-

mission, in which it was stated that it had been notified by the Tidewater Railway Company that the latter company desired to cross the line of the Norfolk and Western Railway at a certain point in Norfolk county, in South Norfolk near the city of Norfolk. Under this petition, notice was served upon both the companies, fixing a day for the hearing by the Commission, and these proceedings resulted from that notice.

The Commission having considered all the papers, plans and maps filed before it and all the testimony taken before it on the hearing, is of opinion as follows:

I. The Tidewater Railway Company filed a written motion before the Commission amounting, substantially, to a motion to dismiss the petition of the Norfolk and Western Railway Company on the ground that that petition had not been filed within fifteen days from the date of the service upon it of the notice from the Norfolk and Western Railway Company, that the latter company would apply to the Commission to inquire into the matter. The Commission is of opinion to overrule this motion and accordingly does so.

II. The Norfolk and Western Railway Company objected that the notice given to it by the Tidewater Railway Company and the accompanying papers were not in sufficient compliance with the terms of the statute, requiring that the Tidewater Railway Company should submit to it plans, specifications, appliances and methods of operation as to the proposed crossing.

The Commission is of opinion that the notice, and plans and papers accompanying it, given to the Norfolk and Western Railway Company by the Tidewater Railway Company, were in sufficient compliance with the statutes, and this objection is accordingly overruled.

III. It is a well recognized principle that railroad companies hold their property for public use, and exercise their franchises to such an extent as governmental functions, that the use of their properties and the exercise of their franchises are both subject to such regulations as may not unreasonably interfere with the property rights of the persons owning the roads. Persons investing in and operating a railroad acquire their rights subject to these general principles.

Pursuant to these fundamental rules, the constitution of Virginia has provided, in section 166, that every railroad company shall have the right, subject to such reasonable regulations as may be prescribed by law, to cross with its roadway any other railroad or railroads. This general right in one railroad to cross another has existed in Virginia for many years under section 1094 of the Code of 1887.

Following the provisions of section 166 of the constitution, the legislature has provided, in section 62 of chapter IV of the Act Concerning Public Service Corporations, that any railroad company created under the laws of this state, which shall have fully located the route of its railway, shall have power, in the construction of its said railway on such route, to cross any intervening railroad in the manner and upon the terms prescribed by section 3 of chapter II of the said Act. The first sentence of section 3, under which this proceeding was brought, allows, also, in general terms, one railroad to cross another railroad. There can, therefore, be no question as to the absolute general right, both under our constitution and statutes, existing in one railroad to cross another railroad. The proceeding through which this right is to be exercised in the event that the railroads cannot agree upon a method of its exercise themselves, is found in the specific statute under which this matter was brought before the Commission. In addition to this specific statute, the Commission would doubtless have general power, under the authority conferred upon it in the constitution, to overlook and prescribe the construction and appliances used in the crossing.

In section 38 of chapter IV of the Act Concerning Public Service Corporations [sec. 1294d (38)], it is declared to be the general policy of the state that all crossings of one railroad by another, or of a county road or a highway by a railroad, shall, whenever reasonably practicable, pass above or below the existing structure. This statute should be considered by the Commission in the exercise of the duties imposed upon it by the specific statute under which it is acting, as one of the elements by which its judgment is to be guided, but not as the single controlling regulation. It is far more important that this statute should be rigidly applied in the crossing of highways by railroads and in the crossing of an

electric line by a steam railroad than in the crossing of one steam road by another, as, in the former instances, the danger is much more constant and recurring, and the safety appliances and signals much less applicable.

IV. In the argument before the Commission, much was said as to the exercise of the power of eminent domain or condemnation. The Commission does not consider that it has before it in this proceeding any matters relating to condemnation. Owing to the absolute right given to one railroad to cross the route of another, it need not be condemned. This is apparent from a fair construction of the entire section 3 which we are considering. The right to cross is absolute, and need not be condemned and is not the taking of property, the railroad to be crossed holding its roadway under a public use subject to the right to have it crossed by any other railway. The method of crossing is to be prescribed by the Commission.

In the last sentence of the statute, provision is made for the payment of damages by the company desiring to cross the works of another company, "Such damages to be ascertained according to the laws regulating the exercise of the right of eminent domain." This manifestly refers to the incidental damages to the general business and operations of the road to be crossed, and not to the damages for property to be taken. Under our construction of the statute, if the Norfolk and Western Railway Company is damaged by the method of crossing, it should require the Tidewater Railway Company to apply to the proper court having jurisdiction for the appointment of commissioners, to ascertain those incidental damages in the manner provided for in the recent Act concerning the exercise of the power of eminent domain.

It is provided in the statute carried in the Code of 1904 as subsection 52 of section 1105e, that no corporation shall take by condemnation proceedings any property belonging to any other corporation possessing the power of eminent domain unless, after hearing all parties in interest, the State Corporation Commission shall certify that a public necessity or that an essential public convenience shall so require; and, further, that in no event shall one corporation take by condemnation proceedings any property owned

by and essential to the purposes of another corporation possessing the power of eminent domain.

We do not think this statute has any application in the proceeding now before the Commission. It evidently has reference to the actual taking of property in all cases in which the right to use it is not otherwise given. It is, in this case, not necessary that the Commission should certify that a public necessity or an essential public convenience requires that the Tidewater Railway Company should cross the Norfolk and Western Railway Company, for the reason that the constitution and other statutes allow this crossing to be made and amount to a statement by a power higher in authority than the Commission that such public necessity and such essential public convenience do require that the crossing shall take place.

This being the case we do not think that, in this proceeding, the Tidewater Railway Company is asking that it be allowed to take any of the property belonging to the Norfolk and Western Railway Company, but the Commission is simply required to overlook and safeguard the exercise of the guaranteed right by the Tidewater Railway Company.

As above stated, if the exercise of that right causes incidental damage to the Norfolk and Western Railway Company, those damages should be ascertained by the appointment of commissioners under the condemnation statute.

The legislature has manifestly proceeded upon the assumption that the foregoing principles are sound, in drafting the statute under which this proceeding is had. The statute does not contemplate, as a matter of course, that damage may ensue from the crossing nor that proceeding to ascertain the amount of compensation for such damages would, in every instance, be necessary.

The statute provides: "If any such crossing or change as is provided in this section cause damage to the works of any company or of any county, or to the owner or occupant of any lands, the company exercising the privilege herein granted, shall make proper compensation for such damage." This shows that within the legislative intent, the crossing was a privilege which was granted and was not a taking of property within the meaning of the condemnation statutes. Otherwise, this sentence in the statute would

not have been put in the conditional, but a positive affirmation would have been made of the necessity, on the part of the crossing company, to resort to condemnation proceedings to acquire the easement or servitude of crossing as well as to ascertain the damages which might, incidentally, result to the works or operations of the company to be crossed.

V. It was earnestly contended, on behalf of the Norfolk and Western Company, that the recent case of *R. F. & P. Railroad Company v. Johnston*, decided by the Court of Appeals of Virginia during this year (49 S. E. 496), controlled this case, inasmuch as the located line of the Tidewater Railway Company crossed the tracks of the Norfolk and Western Railway Company near or at the throat of a proposed yard of the latter company, property for the establishment of that yard having been purchased by the Norfolk and Western Railway Company in the year 1903. We have examined carefully the case referred to and we do not think that the decision is applicable to the facts of this proceeding.

The statutes construed in the *Johnston case* are not similar to the statutes under which the Commission is acting and have no bearing upon the proceedings now before the Commission. In the *Johnston case*, the question was solely one of condemnation for the purpose of opening a public highway or road. Section 951 of the Code of 1887 provided for the exercise of the right of condemnation for the purpose of opening and establishing a public road, sections 1095 and 1096 of the Code of 1887 contemplate the construction of a public or county road across a railroad. In the *Johnston case*, the court held that these latter two sections gave no power to the court to condemn property for a public road across the depots, stations or yards of railroads.

In the proceeding before the Commission, the right to cross a railroad is an absolute right and not one to be exercised by condemnation. The statute construed in the *Johnston case* was a general statute under the terms of which the propriety of opening a public road and the exercise of the power of condemnation was within the judicial discretion of the county court to be used for the benefit of the public. In the case we have in hand, the right to cross is claimed by a definite chartered company, and the Commission has no authority to deny it that right.

Secton 1094 of the Code of 1887, was the section under which the board of public works exercised to a large extent the same functions now imposed upon the Commission by the statute under which this proceeding is had. Section 1094 allowed "Any railroad, turnpike or canal company" to cross any other such company or county road if found necessary in the construction of its works. The present statute is broader in its language in that the crossing company is described as "any railroad, canal, turnpike or other public service corporation." Both of these statutes contemplate the necessity for a crossing by a chartered company in the course of the construction of its route.

It is to be observed that, while the internal improvement companies mentioned both in section 1094 and in the present statute, are allowed to cross a county road, these statutes do not make any provision for the crossing of the routes of these internal improvement companies by a county road. If section 1094 of the former Code had been, in any way, under consideration in the *Johnston case*, the decision then would have had a very material bearing upon the matter now before the Commission.

In the statutes under consideration by the court in the *Johnston case*, no provision is made for the opening of a public road, or for the crossing by such a road in the course of its construction of a railroad or turnpike or canal, except by the exercise of the power of condemnation under the general condemnation statute. This clearly appears from the reading of section 951 of the Code of 1887, in connection with sections 1095 and 1096. The latter two sections simply contain certain regulations as to the manner of the crossing of the railroad by a public road and give, in terms, no right to cross, nor even to condemn, so that, for the power of condemnation, we are obliged to look to section 951 and the adjoining sections of the Code of 1887.

The question, therefore, before the court in the *Johnston case* was, whether there was any power under these statutes to locate a public road, in course of construction, across the yards and station property of a railroad. It was held that no such specific power being given, and no tribunal being authorized to pass upon the location of a public road with reference to its crossing of a railroad, the power did not exist in locating a public road to

have it run across or through such properties of a railroad company.

In the statute under which these proceedings now before the Commission is had, we take it that the right to cross is clear and no condemnation for that purpose is required. The Commission is the tribunal upon which is imposed, in terms, the duty of passing upon "the propriety of the proposed location"; so that the argument made before the court in the *Johnston case* does not reach the statute, the construction of which we are considering.

In passing upon the question of "the propriety of the proposed location," the Commission should be guided by all the facts in relation to both companies bearing upon the question. It is given jurisdiction to pass upon the question and its determination as to "the propriety of the proposed location" is reviewable, so that, if it errs in its judgment, it can be corrected.

Our conclusion, therefore, is, that the question, passed upon by the court in the *Johnston case*, cannot arise before the Commission in this case and that the statute giving the Commission jurisdiction to pass upon the location, seems to meet the very trouble encountered in the *Johnston case*.

VI. The important question at issue between the two companies before the Commission in this proceeding is, as to whether or not the crossing of the Norfolk and Western Railway Company by the Tidewater Railway Company should be at grade or overhead.

A large amount of testimony was taken by both sides and many maps and documents were filed on the hearing. After careful and thoughtful consideration of all of the facts in this case, and having reference to the general character of the country around Norfolk, to the railroads centering there, the various crossings now in existence, and the relative dangers and inconveniences to the public likely to follow from the adoption of the one or the other method of crossing, and all other facts adduced before the Commission, the Commission is of opinion that, in this instance, a grade crossing should be allowed.

Having reached this conclusion, the statute provides that the Commission may employ expert engineers to examine the location, plans, specifications, appliances and methods of operation proposed to be employed in the crossing and report to the Commission.

In the case now before the Commission, the plans, specifications, appliances and methods of operation submitted by the Tidewater Railway Company to the Norfolk and Western Railway Company are very definite and detailed and do not seem to have been made the subject of criticism by any of the experts who testified, in the event a grade crossing should be allowed. The great mass of the testimony was as to the necessity for disallowing such a crossing, and as to the character, methods and expense of an overhead crossing. As the plans, specifications, appliances and methods of operating a grade crossing seem to be admitted to comprise all the devices of the most modern character calculated to render such a crossing efficient and safe, the Commission does not see the necessity, in this case, of putting the parties to the expense of employing expert engineers. From the topography of the ground, it is manifest that the location selected by the Tidewater Railway Company is practically the only place at or about which a crossing could reasonably take place.

The Commission will enter an order providing in detail for the crossing at grade.